STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 96B128

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOHN D. MARTINDALE,

Complainant,

v.

DEPARTMENT OF CORRECTIONS,
LIMON CORRECTIONAL FACILITY,

Respondent.

The hearing was held on July 30, 1996, in Denver, CO before Margot W. Jones, administrative law judge (ALJ). Respondent appeared at the hearing through John Lizza, assistant attorney general. Complainant, John D. Martindale, was present at the hearing and represented by Carol Iten, attorney at law.

Respondent called the complainant to testify at hearing. Complainant did not call witnesses to testify at hearing.

Respondent's exhibit 1 was admitted into evidence without objection. Respondent's exhibits 7 and 8 were admitted into evidence over objection. Respondent's exhibits 3 through 5 were not admitted into evidence. On the ALJ's motion, exhibits 6 and 9 were admitted into evidence.

MATTER APPEALED

Complainant appeals the termination of his employment.

ISSUES

1. Whether complainant engaged in the acts for which discipline was imposed.

2. Whether the conduct proven to have occurred constitutes violation of State Personnel Board Rule, R8-3-3.

3. Whether the decision to terminate complainant's employment was arbitrary, capricious, or contrary to rule or law.

4. Whether complainant is entitled to an award of attorney fees

and cost.

PRELIMINARY MATTERS

1. Complainant filed a notice of appeal of the termination of his employment on March 12, 1996. By notice dated March 18, 1996, the parties were advised that a hearing would be held on April 23, 1996. On this date, the parties were also advised that prehearing statements would be due on or before April 3, 1996.

2. On April 1, 1996, complainant moved to continue the hearing date and for an enlargement of time in which to file a prehearing statement. Complainant's motion indicated that respondent had no objection.

3. On April 3, 1996, respondent, through counsel, John Lizza, assistant attorney general, moved for an extension of time in which to file a prehearing statement. The motion represented that counsel was assigned the case on March 19, 1996, and due to the press of business counsel needed additional time in which to prepare a prehearing statement.

4. On April 15, 1996, the ALJ entered an order granting the parties' April 1 and 3, 1996, motions. Complainant timely filed his prehearing statement on July 9, 1996. Respondent failed to timely file a prehearing statement.

5. On May 1, 1996, following an April 22, 1996, telephone setting conference with the parties, this matter was set for hearing on July 29 and 30, 1996.

6. On Friday, July 26, 1996, prior to the commencement of the Monday, July, 29, 1996, hearing date, Respondent filed a combined prehearing and amended prehearing statement. Respondent also filed a motion to delay commencement of hearing or to continue hearing. Respondent's motion was addressed at hearing on July 29, 1996.

Respondent's July 26, 1996, motion to delay the commencement of the hearing or to continue the hearing stated that counsel was required to attend a meeting at 9:00 a.m. on July 29, 1996. Counsel represented that he learned of the meeting on July 26, 1996. Counsel requested that the hearing in this matter be delayed until 1:00 p.m. on July 29, 1996.

7. On July 29, 1996, complainant appeared for hearing prepared to proceed. Respondent appeared at hearing through Diane Marie Michaud, assistant attorney general. Michaud appeared at hearing for the limited purpose of advising the ALJ that respondent's counsel, John Lizza, could not appear for hearing at 1:00 p.m. Michaud requested a continuance of the hearing date.

Complainant objected to a continuance of the hearing date.

Complainant maintained that he was prepared to proceed and that it was unfair to further delay the hearing in this matter. Complainant represented that he was terminated from his employment effective March 8, 1996, and further delay of the review proceeding would create hardship.

Respondent's request to continue the hearing date was denied. The parties were directed that the hearing would reconvene at 9:00 a.m. on July 30, 1996, the following day. Michaud advised the ALJ that she had not been advised that respondent's counsel was unavailable for hearing on this date.

8. On July 30, 1996, the parties appeared for hearing. Respondent appeared through John Lizza, assistant attorney general. Complainant again appeared at hearing with counsel, Carol Iten.

Complainant moved for sanctions to be imposed on respondent. Complainant also moved for an award of attorney fees and cost. Complainant argued that an order should be entered limiting the evidence that respondent could present at hearing.

Complainant contended that he requested information through discovery on June 21, 1996. Complainant contended that he received no response to his discovery request. Complainant filed a second request for discovery on July 9, 1996. Complainant's counsel represented that when she received no response to the July 9 discovery request on July 22, 1996, she contacted respondent's counsel requesting the discovery.

Complainant maintained that respondent's prehearing statement was received on July 26, 1996, at 4:56 p.m. with the discovery attached thereto. It is complainant's contention that by providing the requested information less than one day prior to the scheduled hearing date, there was inadequate time to prepare for hearing.

Complainant contends that he was terminated from employment for the reasons stated in a March 7, 1996, letter of discipline. He maintains that those reasons as they are stated in the letter of termination are vague and non-specific. Complainant represents that the letter of termination provides that the termination of his employment is based on his actions shooting a rubber band at an inmate and based on the following allegation, contained in the March 7, 1996, letter:

> 2. The more serious issue of you instigating harm to your ex-wife through inmate Windsor has been extensively investigated. You deny doing it jokingly or referencing it in any other way. There is documentation that you made reference on occasion that inmate Windsor should go

see your ex-wife and have sex or kill her. You admit that you did discuss personal issues with inmate Windsor about going back to court because of your ex-wife.

Complainant argues that he had no information about the underlying facts of the allegations contained in the paragraph quoted above. He argues that the prehearing statement and the information requested through discovery might have elucidated respondent's case, so that complainant could appear for hearing prepared to defend himself against the allegation. However, since the information was not timely provided, complainant contends he has had inadequate time in which to prepare a defense. Complainant contends that it would be a denial of due process to permit respondent to go forward with the evidence identified in his prehearing statement. On this basis, complainant argues that sanctions should be imposed on respondent and attorney fees and costs awarded complainant.

Respondent argued that entry of an order for sanctions was too harsh. Respondent contended that complainant's motion for sanctions should be denied. Respondent further argues that complainant's position in opposing respondent's motion to continue the hearing date and requesting sanctions is inconsistent. Respondent maintained that if complainant felt unprepared to proceed at hearing because complainant did not have adequate time to review the information provided on July 26, 1996, then a continuance of the hearing date would be the appropriate remedy.

Respondent further argued that no prejudice resulted from the late filing of respondent's prehearing statement. Respondent contended that because complainant's counsel was present at the R8-3-3 meeting she was fully apprised of the basis of the disciplinary action during that meeting and cannot maintain that she is unprepared to present a defense.

Finally, respondent contended that complainant also untimely filed his prehearing statement and that respondent never received complainant's first request for discovery which complainant represented it served on respondent on June 21, 1996.

9. An order was entered on July 30, 1996, limiting the evidence that could be presented at hearing to the witnesses and exhibits identified in complainant's prehearing statement. Complainant was found to have timely filed his prehearing statement. It was further found that complainant was unable to establish that he served respondent with a discovery request on June 21, 1996. However, respondent concedes that it received the second discovery request on July 10, 1996.

It appears that because of the prehearing procedures followed by respondent, complainant could not reasonably be expected to appear at hearing and defend against the allegations that form the basis of the decision to terminate his employment.

10. In response to the ALJ's order, respondent called as a witness at hearing, Sergeant Gerry Smith. Complainant objected on the grounds that the witness is identified in complainant's prehearing statement in anticipation that complainant would be provided the information requested through discovery clarifying the role the sergeant played in this matter. Complainant argued that he felt compelled to identify the sergeant in a timely fashion in the prehearing statement in order to avoid being precluded from calling the witness in the event information produced through discovery revealed that the witness could offer relevant testimony at hearing.

Respondent contended that complainant's counsel was provided sufficient information at the R8-3-3 meeting about Sergeant Smith's involvement in the allegations that lead to complainant's termination. Respondent contends that at pages 7, 10, 11, and 18 of the transcript of the R8-3-3 meeting (Respondent's exhibit 6), there was a discussion of Sergeant Smith's involvement in this matter, and thus complainant cannot be heard to complain that he is unaware of the witness' testimony. Respondent further contends that in the March 7, 1996, letter of discipline complainant was provided adequate information upon which to prepare for examination of the witness at hearing.

Respondent was precluded from calling Sergeant Smith. The ALJ reviewed those documents provided by respondent as evidence that complainant had sufficient knowledge of the sergeant's anticipated testimony. The respondent's prehearing statement, the transcript of the R8-3-3 meeting, a page from the Department of Correction's investigative report of the incident giving rise to the disciplinary action (Exhibit 9) and the letter of termination did not provide sufficient information about Sergeant Smith's involvement in this matter as to conclude that complainant was prepared to examine the witness at hearing.

FINDINGS OF FACT

1. Complainant John D. Martindale (Martindale) was employed by the Department of Corrections (department) as a correctional officer since 1981. Martindale was assigned to work at the Limon Correctional Facility in 1991. He remained assigned to this facility until the termination of his employment in 1996.

2. Martindale was familiar with administrative regulations promulgated by the department which prohibited staff members from engaging in horseplay with inmates or from discussing personal matters with inmates.

3. The department has adopted a Code of Penal Discipline which governs the conduct and the consequences of conduct engaged in by

inmates. Inmates who are found guilty of horseplay can receive a penalty of ten days in segregation, a five to seven day loss of good time, or 14 days of two hours of extra duty.

4. In or around January, 1996, Martindale was engaged in horseplay with an inmate. Martindale shot a rubber band at the inmate. The inmate sued the department as a result of this incident.

5. Martindale also mentioned to the inmate that he was returning to court as the result of proceedings related to his divorce from his wife.

6. Prior to February 29, 1996, Martindale received notice that an R8-3-3 meeting was scheduled to consider whether disciplinary action should be imposed. Martindale was advised that the meeting would be held to consider allegations that he engaged in horseplay with an inmate when he shot the inmate with a rubber band, discussed personal matters with the inmate and requested that an inmate cause harm to his ex-wife.

7. Martindale attended the R8-3-3 meeting on February 29, 1996, with his representatives, Robert Roybal and Carol Iten, and the delegated appointing authority, Robert Furlong, superintendent of the Limon Correctional Facility. At the R8-3-3 meeting, Martindale requested additional information about the allegations of misconduct. Furlong refused to provide him additional information. Martindale advised Furlong that he shot a rubber band at an inmate, but he did not hit the inmate's eye. Martindale further advised Furlong that he did not make threats again his ex-wife. Martindale maintained that his discussion with the inmate about his need to return to court was not of a personal nature.

8. Following the R8-3-3 meeting, on March 7, 1996, Martindale was advised that his employment was terminated effective March 8, 1996. The basis of the decision to terminate Martindale's employment was cited to be his actions in engaging in horseplay with an inmate, having a personal discussion with the inmate and his alleged actions asking an inmate to kill or have sex with his ex-wife.

DISCUSSION

Certified state employees have a protected property interest in their employment and the burden is on Respondent in a disciplinary proceeding to prove by a preponderance of the evidence that the acts on which the discipline was based occurred and just cause exists for the discipline imposed. Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994); Section 24-4-105 (7), C.R.S. (1988 Repl. Vol. 10A). The board may reverse or modify the action

of the appointing authority only if such action is found to have been taken arbitrarily, capriciously or in violation of rule or law. Section 24-50-103 (6), C.R.S. (1988 Repl. Vol. 10B).

The arbitrary and capricious exercise of discretion can arise in three ways: 1) by neglecting or refusing to procure evidence; 2) by failing to give candid consideration to the evidence; and 3) by exercising discretion based on the evidence in such a way that reasonable people must reach a contrary conclusion. Van de Vegt v. Board of Commissioners, 55 P.2nd 703, 705 (Colo. 1936).

In this case, respondent failed to establish that complainant solicited an inmate to do harm to his ex-wife. Respondent did establish, through complainant's admissions, that he engaged in horseplay with an inmate and had a personal discussion with the inmate.

Complainant's admissions did not provide sufficient grounds for the decision to terminate his employment. No evidence was presented at hearing regarding complainant's employment history. No evidence in mitigation or aggravation was presented such that it can be concluded that complainant's employment record, when viewed in conjunction with the allegations proven here, support the decision to terminate his employment.

The action from which this discipline arose was groundless. Complainant is cited for taking action for which there was no evidence to support. As a result, complainant is entitled to an award of attorney fees and cost under section 24-50-125.5 C.R.S. (1988 Repl. Vol. 10B).

CONCLUSIONS OF LAW

1. Respondent failed to establish that complainant requested that an inmate do harm to his ex-wife.

2. Respondent established that complainant engaged in horseplay with an inmate and discussed personal matters with an inmate.

3. Respondent established that the conduct proven violated its administrative regulations.

4. Respondent's decision to terminate complainant's employment was shown to be arbitrary and capricious.

5. The action from which this appeal arose was groundless to the extent that respondent failed to present evidence that complainant asked an inmate to harm his ex-wife.

ORDER

1. Respondent is directed to rescind the disciplinary action dated March 7, 1996, terminating complainant's employment.

2. Respondent may impose a corrective action for the conduct proven to have occurred.

3. Respondent shall reinstate complainant to the position held at the time of the termination of his employment with full back pay and benefits from the date of termination to the date of his reinstatement, with the appropriate offset as provided by law.

4. Complainant is awarded attorney fees and costs under section 24-50-125.5 C.R.S. (1988 Repl. Vol. 10B).

Dated this____ day of
September, 1996,
at Denver, Colorado

_____
Margot W. Jones
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ___ day of September, 1996, I placed a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Carol Iten
Attorney at Law
789 Sherman Street
Denver, CO 80203

and in the interagency mail, addressed as follows:

John Lizza
Department of Law
1525 Sherman St., 5th Floor
Denver, CO 80203

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), 10A C.R.S. (1993 Cum. Supp.). Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), 10A C.R.S. (1988 Repl. Vol.); Rule R10-10-1 et seq., 4 Code of Colo. Reg. 801-1. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The estimated cost to prepare the record on appeal in this case without a transcript is **$50.00**. Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record should contact the State Personnel Board office at 866-3244 for information and assistance. To be certified as part of the record on appeal, an original transcript must be prepared by a disinterested recognized transcriber and filed with the Board within 45 days of the date of the notice of appeal.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to

the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 1/2 inch by 11 inch paper only. Rule R10-10-5, 4 CCR 801-1.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R10-10-6, 4 CCR 801-1. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ, and it must be in accordance with Rule R10-9-3, 4 CCR 801-1. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.